Supreme Court, U.S.
F I L E D
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CASE NO. 97-113

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

PERRIN W. HURDLE

Petitioner,

versus

SEARS, ROEBUCK AND COMPANY

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUMMARY OF THE ARGUMENT

The issue of whether an improperly executed waiver of a claim under the Age Discrimination in Employment Act is void or voidable is not one that is worthy of this Court's review for the following reasons. First, contrary to the Petitioner's assertion, there is not a real and embarrassing split among the circuit courts of appeals, as only five of the thirteen circuits have opined on this issue.

Second, when the other courts of appeals rule on this issue, it is probable that those courts will follow the rulings of the Fourth and Fifth Circuits, resulting in the view espoused by the Third, Seventh, and Eleventh Circuits to be a marked minority view.

Finally, even though the Petitioner claims that he was denied a right protected for others in different geographical areas, a review by this Court would not allow the Petitioner any relief, as the waiver was properly executed. Thus, review by this Court is not warranted.

ARGUMENT

I. THE QUESTION OF WHETHER OR NOT A WAIVER OF A CLAIM UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT IS VOIDABLE IS NOT AN APPROPRIATE QUESTION FOR THIS COURT'S REVIEW, EVEN IF THE REQUIREMENTS OF THE OLDER WORKERS BENEFIT PROTECTION ACT WERE NOT MET.

On October 16, 1990, the Age Discrimination in Employment Act ("ADEA") was amended by the Older Workers Benefit Protection Act ("OWBPA"). *Blisten v. St. John's College*, 74 F.3d 1459, 1464 (3d Cir. 1996). The OWBPA provided, in pertinent part, that:

> (1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum --
>
> > (A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;
> >
> > (B) the waiver specifically refers to rights or claims arising under this Act;
> >
> > (C) the individual does not waive rights or claims that may arise after the date the waiver is

executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

Public Law 101-433, *codified as* 29 U.S.C. § 626(f)(1). At the time of this enactment, there was no dispute that a discharged employee would be allowed to waive any valid claim under the ADEA; the amendment merely qualified what acts would be considered a knowing and voluntary waiver of this type claim.

Blisten, 74 F.3d at 1465.[1]

The question presented in this Petition, however, is whether or not a waiver of an ADEA claim, which fails to meet the requirements of the OWBPA, is void as a matter of law, or merely voidable and thus, subject to ratification.

The Petitioner argues that this question is worthy of this Court's review due to a split in the Circuit Courts of Appeal that has caused him to be deprived of his due process rights under the Fourteenth Amendment to the United States Constitution. According to the Supreme Court Rules, when deciding whether or not to grant certiorari, this Court will consider, among other factors, whether there is a split in the decisions of the Courts of Appeals or whether a Court of Appeals "has decided an important question of federal law that has not been, but should be, settled by this Court . . . ." Sup. Ct. R. 10. In further explaining this Court's exercise of its power to grant certiorari, the Court has

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[1] Prior to the enactment of OWBPA, there was a split in the Circuit Courts of Appeals regarding the question of whether or not a waiver should be decided according to a federal common law "totality of the circumstances" test or according to ordinary state contract law. *Blisten*, 74 F.3d at 1465. The OWBPA essentially codified the totality of the circumstances test. *Id.*

stated that when it is faced with a conflict among the opinions of the circuit courts of appeals, it will usually grant certiorari only in the event of a real and embarrassing conflict among the circuits. *National Labor Rel. Bd. v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951) (quoting *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923)). In the present case, this matter is not one worthy of this Court's review for three reasons. First, there is not a real and embarrassing split in the circuits on this issue. Second, only five circuits have ruled on this issue and it is likely that with time, the view expressed by the Fourth and Fifth Circuits will become the majority view. Finally, this particular case is inappropriate for review because the release involved was properly executed.

A. This Case Presents No Real and Embarrassing Split Among the Circuit Courts of Appeals

A review of the decisions of the various courts of appeals reveals that only the Third, Fourth, Fifth, Seventh and Eleventh Circuits have considered whether or not an ADEA waiver that is not properly executed pursuant to the OWBPA is void as a matter

of law, as opposed to being merely voidable. The Fifth Circuit, for example, has consistently held that a waiver which does not meet the requirements of the OWBPA is subject to being renounced at the election of the former employee. *Wamsley v. Champlin Ref. and Chem., Inc.*, 11 F.3d 534, 539 (5th Cir. 1993), *reh'g en banc denied*, 37 F.3d 634 (5th Cir. 1993), *cert. denied*, 115 S. Ct. 1403 (1993). Thus, the waiver is an antecedent contract which is subject to being avoided. *Id.* If the employee fails to renounce the contract soon after learning of its voidablility, then the contract has been ratified because "[a] party cannot be permitted to retain the benefits received under a contract and at the same time escape the obligations imposed by the contract." *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217, 220 (5th Cir. 1991). Therefore, if the aggrieved employee retains the benefits and consideration paid under the waiver contract, then that party has knowingly and voluntarily waived any ADEA claims, thereby ratifying the waiver. *Wamsley*, 11 F.3d at 540. *See also, Grillet*, 927 F.2d at 220; *Wittorf v. Shell Oil Co.*, 37 F.3d 1151 (5th Cir. 1994); *Blakeney v. Lomas Inf. Sys., Inc.*, 65 F.3d 482 (5th Cir. 1995), *cert. denied,*

116 S. Ct. 1042 (1995).

The Fourth Circuit reached the same result in a case decided before the passage of the OWBPA, holding that an invalid waiver of an ADEA claim is a contract that is voidable by the employee at his election, and thus, subject to common law ratification. *O'Shea v. Comm. Credit Corp.*, 930 F.2d 358, 362 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 177 (1991). After the passage of the OWBPA, the Fourth Circuit reexamined *O'Shea* and the provisions of the OWBPA and found that Congress included nothing in the OWBPA to abrogate the common law rule that a waiver that was not executed under the guidelines of the OWBPA was voidable and thus subject to ratification. *Blisten*, 74 F.3d at 1465. Therefore, if a former employee retains the consideration paid for the release of a possible ADEA claim, the waiver has been ratified. Congress did not intend to allow former employees to retain the benefits of a waiver and legally challenge the effectiveness of the very same waiver. *Id.* at 1466.

On the other hand, the Seventh Circuit, as well as the Third and Eleventh Circuits, have held that with the enactment of the

OWBPA, Congress has stepped in and stated very specific circumstances that would be required before an employee in the process of being discharged, can preemptively waive a claim under the ADEA. *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679, 683 (7th Cir. 1993), *reh'g and suggestion for reh'g en banc denied, cert. denied*, 114 S. Ct. 2104 (1993). Thus, according to those circuits, if the waiver the employee signed did not comply with the literal provisions of the OWBPA, then the contract was void and was not subject to the doctrine of common law ratification regardless of whether or not the consideration was returned. *Id.* at 684; *accord*, *Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 412 (1992); *Long v. Sears, Roebuck & Co.*, 105 F.3d 1529 (3d Cir. 1997), *petition for reh'g denied*. While those circuits have established that rule, there is not a real and embarrassing split in the circuits, given the fact that only five of the thirteen circuits have decided the issue. Hence, this Court should not grant certiorari. *Pittsburgh S.S. Co.*, 340 U.S. at 502.

B. The View Expressed by the Fourth and Fifth Circuits Should Become the Clear Majority View Among the Circuit Courts of Appeals

This Court should not grant certiorari since it is probable that when the other circuits do rule on this issue, they will follow the reasoning of the Fourth and Fifth Circuits, thereby making the rulings of the Third, Seventh and Eleventh circuits the minority view. First, the view of the Fourth and Fifth Circuits is the correct view. Second, the rulings of the district courts in other circuits show that those circuits will likely lean toward the view of the Fourth and Fifth Circuits.

1. The View Expressed by the Fourth and Fifth Circuits is Correct

The view expressed by the Fourth and Fifth Circuits is that a waiver that is invalidly executed under the ADEA and OWBPA is voidable at the election of the employee. If the employee fails to repudiate this waiver, it is treated as ratified and becomes a valid and binding waiver. This claim is based on the fact that prior to the enactment of the OWBPA, there was no dispute that employees could waive a potentially valid ADEA claim against their employer. *Blisten*,

74 F.3 at 1465. Thus, even as the Seventh Circuit acknowledged in *Oberg*, in the absence of the OWBPA, there is nothing objectionable to allowing a waiver of an ADEA claim. *See, Oberg*, 11 F.3d at 687 ("Had Congress not spoken this court may have even been inclined to follow *Grillet* and *O'Shea*, and allow employees the freedom to ratify their severance agreements . . . .")

The question thus becomes one of whether or not the OWBPA abrogated the common law doctrine of ratification of an invalid waiver. It is obvious from an examination of the OWBPA that this was not the intention of Congress. In the statute itself, it is stated that "[a]n individual may not waive any right or claim under this Act unless the waiver is *knowing and voluntary* . . . ." 29 U.S.C. § 626(f)(1) (emphasis added). In the legislative history of the OWBPA, the Senate Committee further elaborated on what it considered "knowing and voluntary" in the context of these type waivers by stating that:

> Courts may not consider whether a "knowing and voluntary" waiver has been executed until the party asserting the waiver as a defense first proves that each of the requirements set forth in the bill has been satisfied. These requirements include: (1) the waiver is part of a written agreement; (2) the agreement makes specific reference to rights and claims under

> the ADEA; (3) the waiver does not apply to rights or claims that may arise after the date of the agreement itself; (4) the waiver is exchanged for valuable consideration in addition to what the individual already is entitled to receive; (5) the individual is given a reasonable time period in which to review and consider the agreement; and, (6) the individual is advised in writing to consult with an attorney.

S. Rep. No. 101-263, 101st Cong., 2d Sess. 5, *reprinted in* 1990 U.S. Code Cong. & AD. News 1509 at 1537. It is clear that the items listed in the legislative history are less stringent than those stated in the act. For instance, while the statute specifies the specific number of days for an employee to review the agreement, the Committee merely required that the employee be given a reasonable amount of time to consider the waiver. This variation in language can only be explained if it is assumed that the Committee was indicating that it had no objection to the continuation of the common law rule of ratification in this context. Therefore, when read in conjunction with the general guideline of statutory interpretation that a statute which abridges common law must be strictly construed, *Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297, 304-05 (1959), it is clear that Congress envisioned circumstances where an agreement which fails to

fully meet the requirements in the statute might still be considered valid if it is ratified under traditional common law principles.

Thus, the reasoning of the Fourth and Fifth Circuits is correct and, given time, the other circuits will agree. These rulings will make the view of the Third, Seventh and Eleventh Circuits a markedly minority view; thereby eliminating the need for this Court to rule on the issue.[2]

2. A Review of District Court Cases Show that Other Circuits are Leaning Toward the View Expressed by the Fourth and Fifth Circuits

Furthermore, a review of several district court cases show that the district courts in circuits which have not yet ruled on this issue are leaning toward the view espoused by the Fourth and Fifth Circuits. These courts, after having an opportunity to review the reasoning of both schools of thought, have determined that the view espoused by the Fourth and Fifth Circuits is the most persuasive. *Haslach v. Security Pac. Bank Or.*, 779 F. Supp. 489 (D. Or. 1991); *Hodge v. The New*

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[2] It is interesting to note that a later case decided by the Seventh Circuit has questioned the wisdom of that court's decision in *Oberg*. *See, Fleming v. United States Postal Serv. AMF O'Hare*, 27 F.3d 259 (7th Cir. 1994).

York College of Podiatric Med., 940 F. Supp. 579 (S.D.N.Y. 1996); *Bilton v. Monsanto Co.*, 947 F. Supp. 1344 (E.D. Mo. 1996), *but see, Eye v. Fluor Corp.*, 952 F. Supp. 635 (E.D. Mo. 1997) (recognizing that a split of authority exists within the district). Therefore, when the other circuits have the opportunity to rule on this issue, it is likely they will side with the Fourth and Fifth Circuits, thereby making the opposing view an extreme minority and alleviating the need for review by this Court.

C. This Case is Not Proper for Review, as the Release in Question was Properly Executed under the OWBPA

If this matter were remanded to the district court for trial, it is probable that the district court would rule that the waiver executed by the Petitioner was valid. Hence, this case is not appropriate for review by this Court. Since there is not a real split in the Circuit Courts of Appeals, the only other ground that reasonably may be asserted in support of review by this Court is the argument that the Petitioner has been denied a right allowed others in different geographical areas. However, that argument is not persuasive in this case, as the waiver executed by the Petitioner complied with the literal terms of the

OWBPA. The sections of the waiver that the Petitioner contends do not comply with the OWBPA are that he was coerced into signing the waiver and that he was not given forty-five (45) days to review the waiver. Petition for Writ of Certiorari at 1. These issues, as can be seen from the Petitioners statement of the case, are interrelated and revolve around the events that took place in his supervisor's office the day the Petitioner was told that he was no longer needed at Sears. Petition for Writ of Certiorari at 1. The Petitioner claims that he was only allowed twenty-five (25) minutes to review the waiver and that he was not informed that he would receive severance benefits if he did not sign the waiver. *Id.* Those arguments become moot in the light of Mississippi case law which holds that a person is charged with reading and understanding any document he signs. *Godfrey, Bassett & Kuykendall Architects, Ltd. v. Huntington Lumber & Supply Co., Inc.*, 584 So. 2d 1254, 1257 (Miss. 1991). Further, the Petitioner does not deny that the document he signed stated, in clear and unambiguous language, that he was encouraged to seek the advice of an attorney and that he had forty-five (45) days to decide whether or not to sign the document. Therefore, the Petitioner is charged with knowledge of

those items, and the fact that he chose not to seek the advice of an attorney or to take more than twenty-five (25) minutes in determining whether or not to sign the document does not reflect on the validity of the waiver. The waiver was executed in a manner consistent with the OWBPA. Even if this Court were to remand this case to the district court for trial, the Petitioner would still be in the same circumstances. In conclusion, this Court's review of the Fifth Circuit and District Court's decision in this matter will not allow the Petitioner to recover any relief; thus, there is no reason for this Court to grant certiorari.

CONCLUSION

This matter is not proper for this Court's review. At the present time, there is not a real and embarrassing conflict among the rulings of the circuit courts of appeals because only five of the thirteen courts have ruled on this matter. Further, when the other circuits rule on this issue, they will recognize, as can be seen by the rulings of the district courts in those circuits, that the reasoning of the Fourth and Fifth Circuits is correct, and they will join together to make the view expressed by the Third, Seventh and Eleventh Circuits a marked minority view. At that time, review by this Court will be unnecessary.

Finally, in spite of the fact that the Petitioner has not been allowed to bring his age discrimination claim, a review by this Court will not allow the Petitioner relief, as the waiver involved was properly executed under the OWBPA. Therefore, there is no reason for this Court to review this question, and the Respondent requests that this Court deny the Petition for Writ of Certiorari.

RESPECTFULLY SUBMITTED, this the 15th day of August, 1997.

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